

Chicago Journal of International Law

Volume 3 | Number 2

Article 22

9-1-2002

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Recommended Citation

Jaffer, Jamil (2002) "Strengthening the Wassenaar Export Control Regime," *Chicago Journal of International Law*: Vol. 3: No. 2, Article 22.

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Strengthening the Wassenaar Export Control Regime

Jamil Jaffer *

I. HISTORY OF THE WASSENAAR ARRANGEMENT

As the Cold War began to heat up in the aftermath of World War II, the United States and its allies determined that it would be necessary to coordinate their export of militarily significant equipment to Communist nations, particularly those nations that would eventually make up the heart of the Warsaw Pact. The NATO nations, together with Japan and Australia, created the Coordinating Committee on Export Controls ("COCOM"). For forty-five years, this body served as a clearinghouse for information exchange and consultation among the member nations. However, as the Soviet Union disintegrated and the Cold War came to a close in the early 1990s, the US-Russian relationship saw dramatic improvement. One aspect of the improved relationship took place in the export control arena. In June 1992, the White House announced the creation of an informal "cooperation forum," bringing together the COCOM nations, Russia, and other former Soviet satellites in order to provide the latter nations with access to "advanced Western goods and technology," as well as to create procedures to ensure that transferred technology was not misused.¹ At the Vancouver summit meeting in 1993, Russian President Boris Yeltsin expressed his concern that COCOM was a "relic of the cold war."² US President Bill Clinton agreed to review the COCOM system, noting that Russian cooperation on export controls, particularly regarding arms transfers to Iran, remained a major concern for the United States.³ Soon thereafter, Russia agreed to halt arms sales to Iran, and in March 1994, the United States and its allies terminated the COCOM arrangement.⁴

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1. White House, Office of the Press Secretary, *COCOM Issues* (June 17, 1992), available online at <<http://www.fas.org/spp/starwars/offdocs/b920617e.htm>> (visited Sept 29, 2002).
2. Peter Sullivan, *Export Controls: Conventional Arms and Dual-Use Technologies*, Strategic Forum (Dec 1996), available online at <<http://www.ndu.edu/inss/strforum/forum100.html>> (visited Sept 29, 2002).
3. Id.
4. Id.

II. THE WASSENAAR ARRANGEMENT AND ARMS CONTROL IN THE TWENTY-FIRST CENTURY

The issue of arms and technology transfers remained a deep concern to a number of nations. In particular, the United States was troubled by the increasing transfer of “dual-use” technologies—items that have both a civilian and military use—to nations that it felt posed a strategic threat to global peace and security. As a result, a new mechanism was needed to address multilateral issues of technology transfer and arms control. In July 1996, thirty-three nations met to discuss the problem of export controls on conventional weapons and dual-use goods and technologies.⁵ At the conclusion of these meetings, the nations agreed on a set of “initial elements” that now form the basis for the Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies (“Wassenaar Arrangement”).⁶

The Wassenaar Arrangement attempts to control proliferation of dual-use technologies through a variety of mechanisms, including controls on distribution, information-sharing among member states, and notification of transfers or denials of dual-use goods to non-member states.⁷ While being moderately successful as a cooperative regime for arms control, the agreement has been the subject of increasing criticism from academics and policymakers who argue that it is ineffective at addressing the proliferation of dual-use technology.⁸ In recent years, the United States government has made an active effort to strengthen the Wassenaar regime by advocating stronger rules to prevent member states from undermining efforts to deny export to non-member states and by pressing for closer examination of the end-use of exported items.⁹ However, as of the Seventh Plenary Meeting of the member nations in December 2001, the United States has been unsuccessful in this effort.¹⁰

This development will first examine the main problems with the existing agreement and the economic and political issues underlying dual-use exports. The

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5. The Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies, *Press Statement* (July 12, 1996), available online at <http://www.wassenaar.org/docs/press_1.html> (visited Sept 29, 2002).
 6. The Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies (1996), available online at <<http://www.wassenaar.org/docs/IE96.html>> (visited Sept 29, 2002).
 7. See *id.* at §§ 2–5.
 8. See Report of the Senate Committee on Banking, Housing and Urban Affairs to Accompany S 149, the Export Administration Act of 2001, S Rep 107-10, 1st Sess 20–21 (Apr 2, 2001); R. Ayleen Broadbent, *US Export Controls on Dual-Use Goods and Technologies: Is the High-Tech Industry Suffering?*, 8 *Currents Intl Trade L J* 49, 51 (1999); Chad Bowman, *Cox Urges Stronger Export Controls, Calls Wassenaar Arrangement ‘Toothless’*, 16 *BNA Intl Trade Rep* 926 (1999).
 9. Rossella Brevetti and Corbett B. Daly, *Wassenaar Backs U.S. Enforcement Initiative; U.S. Presses for Strong ‘No Undercut’ Policy*, 16 *BNA Intl Trade Rep* 2007 (1999).
 10. Gary G. Yerkey, *U.S. Fails to Win Backing to Strengthen 33-Nation Wassenaar Export Control Regime*, 18 *BNA Intl Trade Rep* 2018 (2001).

development will then argue that the most effective remedy to address dual-use proliferation is for the Wassenaar nations to adopt a "denial consultation" system similar to that adopted by the European Union in June 2000.¹¹ Further, the development will argue that if such a "denial consultation" regime is not adopted by the Wassenaar member nations at the Eighth Plenary Meeting in December 2002, the United States should complete "key country" agreements outside of the Wassenaar regime in cooperation with states that are willing to help combat dual-use proliferation.¹²

III. EXISTING PROBLEMS WITH THE WASSENAAR ARRANGEMENT

As a successor to the stringent COCOM regime, the Wassenaar Arrangement attempts to address proliferation concerns in the twenty-first century. Given the major changes in the global security environment during the forty-five years since COCOM's inception, when it came time to develop a successor regime, it was clear that the implementation of a new multilateral system adopting the COCOM approach wholesale was simply untenable.¹³ As a result, the Wassenaar Arrangement differs in a variety of important ways from the COCOM system. The most notable difference is the lack of a veto mechanism in the Wassenaar Arrangement.¹⁴ Essentially, the COCOM system allowed a member nation to absolutely prohibit the transfer of technology to a non-member state. Because of a lack of consensus among the broader group of nations that made up the new Wassenaar system, the 1996 agreement contains no such veto provision. Indeed, the Wassenaar Arrangement contains only the weakest of provisions to assist member nations in ensuring that their export license denials are not undercut by other member nations.¹⁵

The "no undercut" provisions contained in the Wassenaar Arrangement require member nations to provide information about exports they deny,¹⁶ as well as

11. See id; European Commission, *Development*, EU Code of Conduct on Arms Exports (June 8, 1998), Operative Provision 3, available online at <<http://europa.eu.int/comm/development/prevention/codecondarmsexp.htm>> (visited Sept 29, 2002).
12. See Bruce Odessey, *Official to Explore Export-Control Deal Among a Few Countries*, Aerotech News & Rev (July 27, 2001), available online at <<http://www.aerotechnews.com/starc/2001/072701/exports.html>> (visited Sept 29, 2002).
13. See John D. Holum, *Testimony Before the Senate Government Affairs Committee on the Wassenaar Arrangement and the Future of Multilateral Export Controls* (Apr 12, 2000), available online at <<http://www.usun-vienna.usia.co.at/wassenaar/holum01.html>> (visited Sept 11, 2002). See also Michael Lipson, *The Reincarnation of CoCom: Explaining Post-Cold War Export Controls*, 6 *The Nonproliferation Rev* 33, 33-34 (Winter 1999), available online at <<http://cns.miis.edu/pubs/npr/vol06/62/lipson62.pdf>> (visited Sept 29, 2002).
14. Kenneth A. Dursht, Note, *From Containment to Cooperation: Collective Action and the Wassenaar Arrangement*, 19 *Cardozo L Rev* 1079, 1113-14 (1997).
15. Id at 1106-16.
16. Wassenaar Arrangement § 5 (cited in note 6).

notification when a member transfers technology or goods that are “essentially identical” to products denied by other members.¹⁷ The export transfer provision requires a nation that transfers goods or technologies that have already been denied export by others to inform all members of its decision to grant the export license.¹⁸ Such notification of a member’s decision to undercut an earlier denial is required to be provided “preferably within 30 days, but no later than within 60 days” of the export license being granted.¹⁹

The net result of these provisions is that members who deny export are essentially forced to notify all other members that there may be an export opportunity available to them. At the same time, the Wassenaar Arrangement only requires that other member nations notify the denying country of the decision to undercut *after* the export license has already been granted. This creates a particularly difficult problem because some nations do not require the grant of a license until the goods are already in shipment and are about to cross the border for export. As a result, a nation that wishes to push the Wassenaar notification provisions to their limits could extend notification to well after the goods had already crossed the border and been transferred into the hands of the country which was originally denied access to the goods. Such a system provides no real opportunity for the denying member to influence the decision of another member who decides to undercut. Indeed, this mechanism may actually create a perverse incentive for the denying member to decline to report the denial because of the concern that it will simply be providing other members with an export opportunity.

For example, suppose that representatives of the Republic of Iran contact IBM in the hopes of purchasing a high-performance computer that falls within the relevant definitions of a controlled dual-use item, both under US law and under the Wassenaar Arrangement. Upon application to the Commerce Department’s Bureau of Export Administration for a license to transfer the computer, IBM is notified that such a license will not be granted because of national security concerns. Under the Wassenaar Arrangement, the United States is then obligated to notify all other member nations of the denial. Upon notification of the denial, a Ukrainian company contacts the government of Iran offering the sale of a computer with similar capabilities. The government of Iran accepts and the transaction goes forward. Suppose further that Ukrainian law does not require the issuance of an export license until the computer is actually about to cross the Ukrainian border for export. Under this scenario, Ukraine is not required to notify the United States of the export until sixty days after the computer has crossed its borders. Of course, by this point, it is likely that the computer is already in Iran and that Iranian government employees are

17. Id at § 2.

18. Id at § 5.

19. Id.

being trained in its use. As a result, it is unlikely that anything short of extremely strong diplomatic pressure applied by the United States government could result in a reversal of the transaction. In the end, the United States has lost both the battle to prevent Iran from acquiring the relevant technology as well as the benefit that would have accrued to its GDP if IBM had been allowed to make the sale. Iran and Ukraine, of course, are the big winners—Iran gets a technology that it sought, even though the US denied export, and Ukraine makes a sale using an opportunity that it might not have otherwise known about, *but for* the Wassenaar reporting requirements.

IV. THE DENIAL CONSULTATION APPROACH

While it is true that the scenario described above represents the extreme case of a Wassenaar member exploiting the information provided to it by waiting until the absolute last moment to fulfill its reporting obligations, it does demonstrate a critical flaw in the Wassenaar mechanism. While the above scenario does not adequately take account of the other *ex post facto* mechanisms available to the United States to punish Ukraine for its sale, it does show that the Wassenaar system provides little opportunity for a denying state to exercise any influence over other members *prior* to their transfer of such goods and technologies.

Recognizing that a veto mechanism is simply infeasible under a broad multilateral agreement like the Wassenaar Arrangement, the United States has recently advocated the use of mandatory denial consultations.²⁰ Such a system would require member states to consult with one another prior to issuing an export license for an item that has already been denied to a non-member. In addition, if a member state decides to go forward with such a transfer, it must provide the denying nation with an explanation for its decision to grant the license. Under such a regime, the decision to export would remain with each member state—thus ensuring each state retains the ultimate decision on export—while at the same time addressing legitimate concerns regarding the potential for undercutting. This type of regime has recently been implemented in the European Union and may provide useful insight for the Wassenaar members in structuring their own program.²¹ In addition, in order to assuage the concerns of nations that fear that an export denial might permanently prevent them from exporting an item, it may be useful to adopt the approach taken by the Nuclear Suppliers Group, which requires that denying nations review their export policy at three year intervals.²²

20. Brevetti and Daly, 16 BNA Intl Trade Rep at 2007 (cited in note 9).

21. EU Code of Conduct on Arms Exports (June 8, 1998), Operative Provision 3 (cited in note 11).

22. Memorandum of Understanding on Implementation of the Guidelines for Transfers of Nuclear-Related Dual-Use Equipment, Material and Related Technology § 4(c), available online at <http://projects.sipri.se/expcon/nsng_mou.htm> (visited Sept 29, 2002).

The implementation of a denial consultation mechanism would correct the perverse incentive to not report transfers of goods and technology and would also provide the denying state with an opportunity to influence the other nation's decision prior to any transfer. By requiring a consultation before the sale is complete, as in the example used above, the United States might be able to threaten Ukraine with the same penalties that it would otherwise impose after the fact. However, because the threat is made prior to the sale, it may be more effective at the margin. This is so because Ukraine has not yet entered into any binding transfer agreements and might be able to back out of the sale at a lower cost—both economically and politically. In addition, because Ukraine is required to consult with the United States prior to transferring the computer, it now bears a reporting requirement analogous to the reporting requirement imposed upon the US. This reporting requirement allows the US some additional leverage. If the US is informed in advance that Ukraine intends to make the transfer to Iran, the US can then choose to change its earlier decision and allow IBM to export the computer. As a result, the perverse incentive to not report a denial is eliminated.

Indeed, in an interesting twist, a non-member nation such as Iran actually stands to benefit under this mechanism because it can create competition between Wassenaar members for its business, as long as it can convince one government to undercut an earlier denial. For example, assume that the IBM computer, while similar in capabilities to the Ukrainian computer, possesses some additional features that Iran values. Under a denial consultation system, Iran can respond to the US license denial by offering to purchase the Ukrainian equipment, perhaps pushing the US into allowing the sale of the higher-value IBM computer instead.

In implementing such an approach to the export of dual-use items, it is also important that the “no undercut” provisions of Wassenaar be codified together in section V of the Arrangement relating to the export of dual-use goods. The current location of the license notification in section II, relating to the scope of the agreement, seems to suggest that the undercutting notification provision is somehow less important than the other notifications relating to denials. Codifying the two provisions together and adding a denial consultation system would represent a strong step towards strengthening the Wassenaar arms control mechanism.

V. KEY COUNTRY AGREEMENTS

Given that the United States has been unsuccessful in obtaining a broad consensus on an approach to address the undercutting problem at two consecutive plenary meetings, a new approach may be required. Some have suggested that this new approach take the form of bilateral agreements with specific nations who share the United States' views on the need for a more effective mechanism to address dual-

use proliferation.²³ Such an approach seems reasonable given the relative ease of negotiating bilateral export control agreements. In addition, such an approach would allow the US to focus on those nations that actually possess sensitive technologies. In the dual-use realm, such technology is largely possessed by the major Western powers—the United Kingdom, Germany, France and Japan. Because these nations also share significant national security and strategic objectives with the United States, obtaining an agreement with each of these nations may be easier than with others. However, it is also important to note that while achieving agreements with these nations may be easier in a relative sense, it will still not be a simple matter. Each of these nations has a significant economic interest in being able to export dual-use goods and technologies and none are likely to revert to a COCOM-type veto system. As a result, it is important that the United States carefully examine where it shares common ground with these nations in the larger context of the global security environment and makes its case on those issues.

VI. CONCLUSION

In examining the dual-use proliferation issues that will be relevant in the twenty-first century, it is important to note that while the Wassenaar Arrangement was created to fill the gap left by the elimination of the COCOM regime, the new global dynamic does not lend itself to the creation of a broad-based COCOM-type veto system. The current members of the Wassenaar Arrangement appear unified behind the notion that not only is such a system infeasible, it is also undesirable.²⁴ As a result, any attempt to strengthen the Wassenaar regime must take place in the context of protecting national sovereignty in export decisions, while addressing the substantive concerns of nations who choose to deny the export of particular goods and technologies. A denial consultation system is but one approach that may serve to alleviate the concerns of nations like the United States while ensuring that nations that choose to export may do so without fear of a large power veto. Should the United States once again fail to obtain a consensus on an approach to address these concerns by the close of the 2002 Plenary Meeting, the negotiation and implementation of key country agreements would appear to be a reasonable approach in the short term. In the end, however, key country agreements can only serve as a stopgap measure. To effectively address the proliferation of dual-use technologies, the Wassenaar nations must implement a system of controls that is more effective than the system currently in place.

23. See, for example, Odessey, *Official to Explore Export-Control Deal Among A Few Countries*, *Aerotech News & Rev* (cited in note 12).

24. Dursh, 19 *Cardozo L Rev* at 1113–14 (cited in note 14).



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